

Message

From: Kupchan, Simma [Kupchan.Simma@epa.gov]
Sent: 9/9/2019 5:40:03 PM
To: Wade, Alexis [Wade.Alexis@epa.gov]
Subject: ESA provision in Arizona draft roadmap

Hi Alexis,

Do you have time to take a look at the draft language pasted below about the ESA approach that Arizona is suggesting for its 404 program? **Ex. 5 AC/DP**

Thanks so much for your feedback.

Simma

<http://static.azdeq.gov/wqd/404/404rm.pdf>

ENDANGERED SPECIES ACT CONSIDERATIONS

The Endangered Species Act of 1973 (ESA) is a federal act that provides for a program to conserve endangered⁴¹ and threatened⁴² species and the ecosystems upon which such species depend (i.e., critical habitats).⁴³ The USFWS implements and enforces the requirements of ESA in Arizona.⁴⁴ Under ESA § 9, it is unlawful for any person to “take” a listed threatened or endangered species.⁴⁵ A person who “takes” a species may be subject to liability under ESA.⁴⁶ A person or applicant may avoid liability for actions that would qualify as “take” if those actions are incidental to otherwise legal activities by obtaining an incidental take authorization from the USFWS. These authorizations are the product of either (1) federal agency cooperation under the provisions of ESA § 7, resulting in an Incidental Take Statement,⁴⁷ or (2) compliance with a Habitat Conservation Plan (HCP) developed under the provisions of ESA § 10, resulting in an Incidental Take Permit.⁴⁸ Although the ESA applies to the take of listed species regardless of whether ADEQ assumes the program, generally, a state may not provide “take” liability protection.⁴⁹ However, stakeholders have identified incidental take liability as a potential risk should the state assume the CWA § 404 program. In compliance with the Guidelines, ADEQ will not authorize any discharge that jeopardizes the continued existence, or adversely modifies critical habitat, of a species listed under ESA.⁵⁰ In addition, ADEQ will consider impacts to listed species and their habitat under subpart D of the Guidelines, as a contributing factor to the significant degradation of WOTUS.⁵¹ Also, while ADEQ may not provide legal take protection, the state intends to coordinate with USFWS and AZGFD to avoid take when practicable by incorporating conservation measures or other project modifications

so that a take incidental to implementing the project would be unlikely to occur. ADEQ intends to develop an MOA with USFWS to allow ADEQ to seek guidance from USFWS on permits that have the potential to adversely affect listed species or critical habitat. Professionals contracted by the applicant would conduct a Biological Evaluation (BE), reaching a conclusion as to the project's likelihood of adverse effects on listed species. In reviewing the BE, ADEQ (potentially in consultation with AZGFD, as negotiated) could make the initial determination of the project's potential effect on listed species. If the state makes a "no-effect" determination (i.e., there are no resources present), the permit process may proceed. If there is a reasonable potential that a listed species may be affected in any way, ADEQ may informally consult with USFWS, as negotiated. Any necessary conservation measures identified during the informal USFWS consultation process to avoid adverse effects that would rise to the level of "take" would be included in the state § 404 permit special conditions. ADEQ intends to negotiate timeframes for all parties involved in reviewing effects on threatened and endangered species. A form of informal consultation is currently implemented within the New Jersey and Michigan § 404 programs. If upon review, and in consultation with necessary parties, there is a likely adverse effect to a threatened or endangered species that cannot be avoided or mitigated to a "may affect, not likely to adversely affect" determination, then a project may "off-ramp" (i.e., transfer) to the USACE for processing, which would trigger an ESA § 7 consultation and issuance of an Incidental Take Statement, or a facility may obtain an ESA § 10 Incidental Take Permit as a prerequisite to issuance of a state § 404 permit by ADEQ. Off-ramped permits will be permanently administered by the USACE. ADEQ intends to follow the aforementioned informal consultation process for projects that may affect a species, as well as provide an off-ramp to the USACE for projects likely to have an adverse effect on a threatened or endangered species that may not be avoided through conservation measures. The criteria and legal framework under which the USACE would receive such permits would be defined in the MOAs between ADEQ, EPA, USFWS, and the USACE. This option allows for potential projects without ESA concerns to be expedited. The following chart summarizes the potential effects on listed species and their habitat and associated coordination and permitting actions:

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